

5 Official Opinions of the Compliance Board 149 (2007)

CLOSED SESSION PROCEDURES – WRITTEN STATEMENT – TOPIC DESCRIPTION REITERATING STATUTORY AUTHORITY, HELD TO BE A VIOLATION

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c/o Patuxent Publishing

The Open Meetings Compliance Board has considered your complaint that the Baltimore County Revenue Authority violated the Open Meetings Act in conducting a closed session on March 8, 2007. For the reasons explained below, we conclude that, although the Authority had a lawful basis for a closed meeting, it violated the Act by failing to prepare a sufficiently detailed written statement prior to closing the meeting.

I

Complaint and Response

The complaint asserted that, on March 8, 2007, the Baltimore County Revenue Authority conducted a closed meeting in violation of the Open Meetings Act. According to the complaint, the session was closed to discuss possible resolution of a dispute with a catering company about payment to the Authority for use of propane. This issue was discussed in an open meeting a month earlier, as reflected in a copy of minutes included with the complaint. Apparently, there was no litigation pending in connection with this matter at the time. The complaint alleged that there was no justification under the Act for closing the March 8 session.

The complaint also alleged that, in closing the session, the Authority violated the procedural requirements of the Act. Specifically, the complaint alleged that the session was closed pursuant to a consensus vote rather than an actual roll call vote. Furthermore, the complaint alleged that no written statement regarding the closing of the session was prepared. In a supplementary letter, you reiterated that “neither the authority’s attorney, nor the board’s chairman nor the authority’s executive director read from any statement.”

In a timely response, Robert Cannon, Esquire, counsel for the Authority, disputed the allegations in the complaint, although the response did not suggest that

the topic of the closed session differed from that stated in the complaint. According to the response, the justification for closing the session March 8 was to “consult with counsel to obtain legal advice,” pursuant to § 10-508(a)(7).¹ The response noted that pending litigation is not a necessary requirement for closure of a session under this provision.

As to the lack of a roll call vote, the response indicated that the session was closed by unanimous vote of the members present, “and it would be redundant to restate each of the names when the vote was unanimous.” Finally, the response indicated that a written statement prior to the closing of the March 8 meeting had been prepared; a copy was appended to the response. In a response to the letter supplementing the complaint, Mr. Cannon stated that “the prepared statement was available at the meeting, was delivered to the Secretary of the meeting prior to the commencement of the meeting and was available to the extent needed.”

II

Analysis

A. Justification for Closure

Subject to the Act’s procedural requirements, a public body may close a meeting in order to “consult with counsel to obtain legal advice.” § 10-508(a)(7); 5 *OMCB Opinions* 130, 133 (2007). Because exceptions allowing closure of a meeting must be narrowly construed, § 10-508(c), we have interpreted this provision as extending “only to the interchange between a client public body and legal counsel in situations where the client seeks legal advice and the attorney provides it.” *Id.* Provided the discussions between the Authority and its counsel were limited to the rendering of legal advice about the propane cost matter, the Authority had a legal basis to close the session to the public. That the meeting occurred before any concrete prospect of litigation with the catering company is immaterial. A different exception, § 10-508(a)(8), permits a closed session to discuss litigation-related matters. But whether or not litigation is involved, a public body’s counsel may render legal advice in a closed session.

B. Procedural Requirements

Before a public body closes a session pursuant to the Act, certain procedural requirements must be followed. For example, assuming the closed session was anticipated in advance of the meeting, notice of the meeting must advise the public

¹ All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

that part or all of the meeting may be closed. § 10-506(b)(3). Following a closed session, certain information about the closed session must be set out in publicly available minutes. § 10-509(c)(2). Pertinent here are procedures required immediately in advance of the closed session – that is, the required vote and completion of a written statement documenting the justification for closure.

1. Required vote

To ensure that a majority of the body actually supports closing the session and is willing to be held accountable for doing so, the Act bars closing unless there is a “recorded vote” immediately before the closed session in favor of closure. § 10-508(d)(1) and (2)(i); 3 *OMCB Opinions* 4, 6 (2000). The Act does not preclude a voice vote, as long as individually identifiable votes are available as part of the public record. 3 *OMCB Opinions* 197, 200 (2002). One method of assuring compliance is to record the vote, whether as a result of a roll call or voice vote, on the form for closing a meeting recommended by the Attorney General. *See* Office of the Attorney General, *Open Meetings Act Manual* App. C (6th ed. 2006). If properly completed, this form assures compliance with the Act. Alternatively, the minutes of the public meeting at which the vote was taken to close the meeting could reflect the members’ votes. In appropriate cases, the minutes might reflect unanimous consent or approval, provided that the minutes also identified the members present in order that a reader of the minutes could easily determine who voted for the closed session. Because we were not provided with a copy of the minutes for March 8, we can offer only a conditional conclusion: If the minutes contain adequate information, the recorded vote requirement under § 10-508(d)(2)(i) was satisfied; otherwise, it was not.²

2. Written statement

As noted in Part I above, the Authority did provide with its response a statement of the Authority’s presiding officer as to the reason for closing the meeting. We cannot resolve the factual dispute whether the statement was prepared at the meeting. We observe, however, that the Act requires the presiding officer to “make” a written statement, not necessarily to read it aloud. §10-508(d)(2)(ii).

² Recording the vote on a form such as that suggested by the Attorney General helps ensure that the information later embodied in publicly available minutes is accurate. Among the disclosure requirements is “a record of the vote of each member as to closing the session.” § 10-509(c)(2)(iii). While the Act provides for disclosure in the minutes of the next open session, we have approved the practice of including the required disclosures in the publicly available minutes of the same date, as long as it includes the minimum information required under the Act and the public is aware of the practice. *See, e.g.,* 3 *OMCB Opinions* 264, 270 (2003). However, disclosure merely reflecting “unanimous consent” in subsequent minutes would fail to satisfy the post-meeting disclosure requirements under the Act.

Assuming, based on the Authority's response, that the statement was prepared in a timely way, nevertheless we find that the statement was not legally sufficient. The Act requires that a written statement must include not only "a citation of the authority under [§ 10-508]" but also "a listing of the topics to be discussed." §10-508(d)(2)(ii). See 5 *OMCB Opinions* 33, 34-35 (2006).

As to the statutory authority, a public body must cite the exact provision, to allow the public to assess compliance by comparing the scope of the statutory exception with the topic to be discussed. See, e.g., 4 *OMCB Opinions* 114, 118 (2005) (statement listing "Section 10-508(a)____" legally deficient). As to identifying the topics of discussion, a public body need not disclose a level of detail that would undermine the confidentiality permitted by law. *Id.* However, we have repeatedly cautioned that merely paraphrasing the statutory language is insufficient, in that it provides the public no opportunity to weigh whether the discussion reasonably fits within the cited statutory exception. 5 *OMCB Opinions* at 35; see also 4 *OMCB Opinions* 142, 145 (2005).

The document provided by the Authority simply cited § 10-508 and went on with the following scattershot description: "Included in the topics to be discussed in closed session are before a contract is awarded, discussion of matters directly related to negotiating strategy; personnel matters; consideration of the acquisition of real property for a public purpose and matters directly related thereto; and consultation with counsel to obtain legal advice and to discuss potential litigation." It is obvious that this statement was not tailored to the circumstances of the March 8 closing. It merely cites § 10-508 generally and includes much else, all seemingly inapposite, in addition to the reference to consultation with legal counsel.³ This so-called topic description, "consultation with counsel to obtain legal advice," being nothing more than a slight paraphrase of the statutory language, was insufficient to satisfy the disclosure requirements of the Act. Indeed, we infer from the generality of the written statement that the Authority found it convenient to recycle this statement whenever it closed a meeting. Such a practice violates the Act. Uninformative boilerplate provides the reader with no opportunity to evaluate the propriety of a closed meeting.

³ The complaint noted that the Authority's counsel indicated that he understood meetings may also be closed for negotiations, a justification vaguely referred to in the written statement. We would be remiss if we failed to point out that there is no basis under the Act to close a session for contract negotiations as much. 1 *OMCB Opinions* 233, 234 (1997). Section 10-508(a)(14), which refers to "negotiating strategy," is limited to the "competitive bidding or proposal process." *Id.* Nor does the "legal advice" exception extend to situations where the lawyer is serving in the role of negotiator rather than legal advisor. 5 *OMCB Opinions* at 134-35.

We are pleased to note that, in his letter replying to the supplement to the complaint, Mr. Cannon indicated the Authority's intention to use the form of written statement appended to the *Open Meetings Manual*. This step should, as Mr. Cannon put it, "eliminate any future questions."

III

Conclusion

We find that the Baltimore County Revenue Authority violated the Act by failing to prepare a sufficiently detailed written statement prior to closing the meeting on March 8, 2007. We find no violation as to the underlying legal basis for the closure. Whether the vote to close the meeting complied with the Act depends on the disclosure included in the public materials not provided to us; hence, we reach no conclusion on this point.

OPEN MEETINGS COMPLIANCE BOARD

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